Supreme Court, U.S.
FILED
APR 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-626

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

MICHAEL N. SHERIDAN and
MARY A. SHERIDAN,
Petitioners,

v.

THE UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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April 19, 1988

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

The government concedes, as it did in *United States* v. *Shearer*, 473 U.S. 52 (1985), and *Johnson* v. *United States*, 107 S.Ct. 315 (1986), that the intentional tort exception does not bar all claims against the government alleging negligent failure to prevent a federal employee from committing an intentional tort. This concession is fatal to the government's position. Acknowledging that liability exists in certain circumstances eviscerates the government's assertion that § 2680(h) bars all claims in which an intentional tort is an "essential element." Moreover, this concession lays bare the utter illogic of the government's statutory analysis, which trumpets strict adherence to the language while simultaneously cre-

ating unsupported self-serving exceptions. For these reasons, as more fully stated herein and in our opening brief, the government's argument must be rejected and the decision of the court below reversed.

1. The government principally relies on *Block* v. *Neal*, 460 U.S. 289 (1983), in arguing that a claim "arises out of" an intentional tort and is thus barred by § 2680(h) "when a tort enumerated in that provision is essential to the plaintiff's claim." Res. Br. at 7. This argument is belied, however, by the very authorities the government cites to support its statutory construction. Foremost, this argument is irreconcilable with *Panella* v. *United States*, 216 F.2d 622 (2d Cir. 1954), and *United States* v. *Muniz*, 374 U.S. 150 (1963): in both cases a "tort enumerated in [2680(h)]," *i.e.* an assault and battery, was "essential" to the plaintiff's claim. The government attempts to square *Panella* with its argument by "reading into" the statutory language (Res. Br. at 19) the proviso that the exception applies only when the intentional tort is committed by a federal employee. Only by relying upon this redrafting of the statute, however, can the government explain why § 2680(h) bars the Sheridans' claim but would not bar an identical claim where the assailant were other than a federal employee. Thus the government cannot conform its "essential element" argument to controlling precedent without eschewing its insistence on strict adherence to the statutory language.

Even indulging the government this one foray into legislative revision, its analysis still founders. The government concedes that § 2680(h) would not bar the Sheridans' claim had their assailant been a prisoner or mental patient who "happened to be a federal employee." The government explains that this is so because the "source of the [government's] duty to control," not the employment status of the assailant, determines its liability. Res. Br. at 18 n.19. While we agree that the source of the duty may play a significant role in determining the applicability of § 2680(h), this analysis betrays the invalidity of the government's "essential element" argument. The government does not explain why the intentional tort committed by a mental patient who "happens to be" a government employee is not an essential element of a claim while the intentional tort here is. Nor does the government explain why, of all the duties the government has, or may assume, § 2680(h) permits recovery only when the "source of the government's duty" is its role as a warden or an orderly. Certainly there is no textual support for this in either the statute or its legislative history. Neither is there support for this in traditional tort law, upon which the Act was built. Thus the government can only defend its position by first insisting upon strict adherence to the language of the statute, then engrafting a limiting proviso, and finally by rejecting strict adherence to its limiting proviso in favor of selective incorporation of traditional principles of tort law.

The government relies on the phraseology in *Metz* v. *United States*, 788 F.2d 1528, 1534 (11th Cir.), *cert. denied*, 107 S.Ct. 400 (1986), to elaborate on its "essential element" analysis: a claim will "be deemed to 'arise out of' an excepted cause of action when the underlying governmental conduct which constitutes an excepted cause of action is 'essential' to the plaintiff's claim." As noted above, the "essential element" argument is specious and particularly unhelpful in construing § 2680(h). But employing this articulation does not yield the result the government urges, for the government fails to account for the distinction between "governmental conduct" and conduct of an individual who happens to be a federal employee. *Cf.*, *Butz* v. *Economou*, 438 U.S. 478, 495 (1978) (rescinding immunity of government officials acting "manifestly beyond their line of duty"); *Otto* v. *Heckler*, 781 F.2d 754, 758, *amended* 802 F.2d 337 (9th Cir. 1986) (holding that no constitutional claim would lie where the intentional torts of a government employee

were not within the perimeters of his authority and hence not governmental conduct). The government concedes that the Sheridans' assailant was not acting within the scope of his employment when he fired upon them. Res. Br. at 11. Thus the "underlying *governmental* conduct" required by *Metz* was not present here. Accordingly, adoption of the "essential element" test articulated by the government would require reversal of the court below.

2. The government concedes that, notwithstanding its "essential element" test and the "sweeping" language of the statute,[1] a claim will lie against the government when there is a "special relationship" between the victim and the government; *i.e.*, where the "source of the duty" is other than the government's status as employer. Res. Br. at 18 n.19. Presumably by "reading into" the statute, the government attempts to limit this concession to cases involving mental patients and prisoners. There is, however, neither textual nor logical support for this limitation and, indeed, the government advances none. It is "hornbook law," for example, that one who voluntarily assumes a duty is obligated to carry out that duty with

[1] As we noted in our opening brief, nothing in the statute or the legislative history supports the gratuitous description of "arising out of" as "sweeping." Pet. Br. at 10-11. The only independent support the government proffers for this characterization is *Kosak* v. *United States*, 465 U.S. 848 (1984). Res. Br. at 6-7. *Kosak*, however, involves a different exception, § 2680(c), which was designed to shield an entire category of governmental activity from the threat of suit. H.R. Rep. No. 2245, 77th Cong., 3d Sess. 38 (1940). Had Congress sought to immunize the United States from liability for injuries resulting from intentional torts, it could have done so in much the same manner as it shielded the government from liability for "any damage from or by floods or flood waters at any place." 33 U.S.C. § 702c. *See United States* v. *James*, 106 S.Ct. 3116 (1986). Unlike either § 2680(c) or the statute discussed in *James*, § 2680(h) focuses on legal causes of action, not a generic physical injury or a specific government activity. Thus there is no inconsistency in reading § 2680(h) narrowly and these other provisions broadly.

due care. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955). It strains credulity to suggest that Congress intended the courts to recognize only one obscure special relationship enumerated in a certain section of the Restatement of Torts, and to disregard all others established in common law.

We principally argued below that the source of the government's duty to the victim determined the applicability of § 2680(h); that the intentional tort exception barred claims in which the government's duty arose solely out of its status as the assailant's employer. The government endorses this approach, albeit grudgingly. This analysis reconciles the results in *Bennett* v. *United States*, 803 F.2d 1502 (9th Cir. 1986), where the government's duty arose out of statute and treaty, *Doe* v. *United States*, 838 F.2d 220 (7th Cir. 1988), where the government's duty arose out of its election to operate a day care center, and *Shearer*, where the government's duty, if any, could only have arisen out of its status as the assailant's employer. This analysis also mandates reversal of the court below, as the government's duty to the Sheridans arose out of its voluntary promulgation of regulations concerning the storage of firearms, and out of its failure to take adequate measures to control a drunk brandishing a firearm on the campus of Bethesda Naval.[2] Accordingly, applying

[2] As it did in *Shearer*, the government argues here that it did not owe any duty to the victims. This argument is made for the first time at this late stage of the litigation and is indeed inconsistent with the government's concessions in its briefs to the court of appeals and at oral argument that the Sheridans' claims would lie had their assailant been other than a federal employee. *See* Pet. App. 13a. If the Sheridans' claims would have been cognizable had their assailant been other than a federal employee, then obviously the government's duty arose independent of its status as the assailant's employer. In any event, the scope of § 2680(h) does not turn on whether there is a duty in this particular case: whether a duty exists in any particular case is a question initially for the district court.

the "source of the duty test," the decision of the court below must be reversed.

3. The government has offered an analysis which is riddled with exceptions, illogical, bootstrapped,[3] premised on selective parsing of the legislative history and dependent on "reading into" the statute key phrases and provisos. Indeed, the government has offered an analysis which apparently starts with the result it wishes to achieve and works its way back to the statute. Thus whatever surface plausibility the government's analysis may have, its application would work aberrant results, impute bizarre motives to Congress and create distinctions "so finespun and capricious as to be almost incapable of being held in the mind." *Indian Towing Co.*, 350 U.S. at 68. *See* Pet. Br. at 25-29.

In contrast, the two alternative analyses we proffer avoid these pitfalls. First, our contention that Congress intended § 2680(h) solely to bar *respondeat superior* claims of intentional torts is consistent with the statutory language and, placed in its historical perspective, is the more compelling reading of the legislative history. For example, the government's repeated reliance on congres-

[3] *See* Res. Br. at 15-17 and n.14. The government asserts that "in [its] view, the 1974 amendment waived sovereign immunity for *both* negligent supervision and respondeat superior claims in cases involving batteries by law enforcement officers." The government then describes its view as "Congress's understanding," which it concludes is entitled to great weight. Res. Br. at 15-16. However, there is simply no support in the legislative history for the government's "view," and no indication that this was Congress' "understanding." The only evidence the government cites in this respect is *Shearer*, which apparently relied on the government's brief for its conclusion that the issue of negligent supervision was presented to Congress during its consideration of the 1974 amendment. As we discussed in our opening brief, Pet. Br. at 14-15, the legislative history and the cases Congress examined describe *respondeat superior* claims. The supervision of the federal agents—whether negligent or otherwise—was not discussed.

sional intent to "proceed cautiously" and to "take it step by step," Res. Br. at 13, suggests that Congress intended only to waive sovereign immunity for government automobile accidents. Thus, by the government's reading of the legislative history, claims involving aircraft or pharmaceuticals would have to await amendment of the statute. As we noted in our opening brief, however, contemporary legal debate focused on whether, as a matter of social policy, it was appropriate to extend the theory of *respondeat superior* liability into the arena of intentional torts. Pet. Br. at 18-19. This extension, we submit, is what Congress was hesitant to endorse and what counseled Congress to proceed cautiously, step by step.

Alternatively, we submit that the intentional tort exception bars only those claims in which the government's duty to the victim arose solely out of its status as the assailant's employer. Thus, the government would be amenable to suit in those cases in which it had assumed a duty to protect the victim (*e.g.*, promulgation of regulations concerning firearms; operation of a day care center), or in those cases where the employment status of the assailant was immaterial to the government's duty and breach thereof (*i.e.*, the fact that the assailant was a federal employee was not necessary for the injury to occur).

Unlike the government's analysis, both of ours are anchored in traditional elements of tort law and avoid creating untenable distinctions and irrational results. Our first argument is the simplest: no claim will lie against the government attempting to impute *respondeat superior* liability for the intentional torts of federal agents. The separate tort of negligently allowing this intentional tort to occur, where it can be proved, will provide liability against the government, since it is undisputed that Congress intended to waive immunity for injuries caused by the government's negligence. Our second argument, that the source of the government's duty

determines the applicability of the intentional tort exception, similarly focuses on traditional components of tort law and similarly avoids creating artificial and illogical distinctions. As it cannot be said that the analysis put forward by the government is unambiguously mandated, and as the government's analysis forces the Court to impute to Congress the intention to "create untenable distinctions and unreasonable results," *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982), the government's arguments must be rejected and the decision below reversed.

CONCLUSION

For the foregoing reasons, and for those reasons stated in our opening brief, the decision of the Court of Appeal for the Fourth Circuit must be reversed.

Respectfully submitted,

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